IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 79-751

ANIBAL SOTTO
and
JOAQUIN A. AMOR,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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The decision below is reported as: Sotto v. Wainwright, 601 F.2d 184 (5th Cir. 1979).

JURISDICTION

The petitioner seeks jurisdiction pursuant to 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

The respondent respectfully rephrases the petitioner's "Questions Presented for Review" as follows:

> WHETHER A PRISONER IS INEQUITABLY DENIED ACCESS TO THE COURTS BY A STATE RULE OF PROCEDURE WHICH REQUIRES A MOTION TO MITIGATE TO BE RULED ON WITHIN A SPECIFIC PERIOD OF TIME WHERE THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO HAVE A MOTION TO MITIGATE RULED ON AND WHERE THE RULE OF PROCEDURE HAS A RATIONAL BASIS?

STATEMENT OF THE CASE

The respondent accepts the petitioner's Statement of the Case as being an accurate account of the proceedings below. The respondent relies on additional facts as set forth in the argument portion of this brief.

ARGUMENT

Rule 3.800(b), Florida Rules of Criminal Procedure, provides for mitigation of an imposed sentence within sixty days after the highest state court has denied certiorari. Although the petitioners timely filed thier motions to mitigate, the mitigation was not granted until the sixty day jurisdictional period had expired. As recognized by the District Court of Appeal of Florida, Third

District's decision in this case:

> A trial court lacks the jurisdiction to mitigate a legal sentence after the above sixty day periods have elapsed or to mitigate a legal sentence by vacating it and placing the defendant on probation. Moss v. State, 330 So.2d 742 (Fla. 1st DCA 1976); State v. Rodriguez, 326 So.2d 245 (Fla. 3d DCA 1976); State v. Brown, 308 So.2d 655 (Fla. 1st DCA 1975); Smith v. State, 289 So.2d 410 (Fla. 4th DCA 1974); Sayer v. State, 267 So.2d 42 (Fla. 4th DCA 1972); Ware v. State, 231 So.2d 872 (Fla. 3d DCA 1970); Jefferson v. State, 320 So.2d 827 (Fla. 4th DCA 1975); State v. Evans, 225 So.2d 548 (Fla. 3d DCA 1969); cert. den., 229 So.2d 261 (Fla. 1969), cert. den., 397 U.S. 1053 (1970).
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> State v. Sotto, 348 So.2d 1222, 1223 (Fla. 3d DCA 1977).

The petitioners recognize this general rule of law, but claim that it does not apply to situations like this where the motion to mitigate is timely filed, but due to circumstances beyond their control, is

not timely ruled upon. It is clear, however, that a trial court must act on a motion to mitigate within the applicable time period, regardless of when the motion to mitigate is filed. State v. Mancil, 354 So.2d 1258, 1259 (Fla. 2d DCA 1978); Sayer v. State, 267 So.2d 42 (Fla. 4th DCA 1972); State v. Evans, 225 So.2d 548 (Fla. 3d DCA 1969), cert. denied 229 So.2d 261 (Fla. 1969), cert. denied 397 U.S. 1053 (1970). Nevertheless, despite the fact that the state proceedings were in accord with the appropriate state law, the petitioners claim that they have a right to have their motions ruled on and that the right is one of federal Constitutional proportion.

The respondent would argue that a prisoner does not have a constitutional

right to have his sentence mitigated (which includes both the filing and deciding of the motion). To support the argument, the respondent would draw an analogy to a prisoner's right to have his conviction reviewed.

In McKane v. Durston, 153 U.S. 684, (1894), the habeas corpus applicant had been convicted and was in the process of taking a direct appeal from the conviction. He did not file a "certificate of reasonable doubt" which was a prerequisite for a stay of execution of the sentence pending review. He argued, therefore, that he was deprived of the "right" to have bail pending his appeal. The court concluded that the applicant did not have a "right" to bail pending review. The basis of the court's reasoning was that:

> . . . A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review.

An appeal from a judgment of conviction is not a matter of absolute right. Consequently, the right to bail pending review is not one required by fundamental due process.

In a more recent case, Estelle v. Dorrough, 420 U.S. 534 (1975), a habeas corpus applicant argued that he was denied equal protection of the law because his appeal was removed from its docket pursuant to statute. The statute provides for the automatic dismissal of pending appeals by an escaped felon upon escape.

The appeal is to be reinstated if the felon voluntarily surrenders within 10 days of the escape. In Dorrough, the felon did not voluntarily surrender. While the United States District Court denied relief, the United States Court of Appeals for the Fifth Circuit reversed holding that the prisoner was denied equal protection of the law.

While the Court of Appeals recognized that there is no federal constitutional right to state appellate review of state criminal convictions, it rendered the statute invalid for two reasons. First, because the statute provided separate treatment for prisoners under a sentence of life imprisonment or death. Secondly, because the statute applies only to those prisoners whose appeals were pending, not to those who had not yet invoked the appel-

late process.

This Court reversed the Court of Appeals finding that neither of those distinctions violate the Equal Protection Clause. The statute was a valid exercise of state power in that it discouraged the felony of escape, it encouraged voluntary surrender, and it promoted the efficient operation of the appellate system.

Similarly, the state does not have an obligation to an individual who has been convicted of a crime to provide a procedure whereby the sentence may be mitigated. Cf. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, __U.S.__, 99 S.Ct. 2100 (1979). A convicted criminal has no due process right to have his conviction reviewed, therefore, he has no due process right to have his sentence reviewed.

Should the state decide to confer such a right upon the individual, it may do so in such terms as it deems proper, as long as the limits which circumscribe the right to review serve legitimate governmental goals (discussed infra).

If the state allows a convicted criminal to move the court to mitigate a sentence, the state may require the motion to be ruled upon by the court within a given time frame, without violating any due process rights owed the movant. In other words, a state may allow a prisoner the right to submit a motion without concurrently providing a right to have the motion ruled upon. The Fifth Circuit, in United States v. Mendoza, 565 F.2d 1285 (5th Cir. 1978), modified on rehearing en banc, 581 F.2d 89, decided as a matter of policy to

put the two rights together, but those "rights" fall short of being a federal constitutional mandate. Therefore, the petitioners have no federal constitutional right to have their motions to mitigate ruled upon outside of the 60 day jurisdictional time limit provided by Rule 3.800(b), Florida Rules of Criminal Procedure.

Because the only right the petitioner's have for their motions to mitigate to be ruled upon is the right which is conferred upon them by the state rule of procedure, the question arises as to whether the state rule of procedure has a rational basis. The primary reason for requiring a motion to mitigate to be ruled upon within a jurisdictional time limit was discussed in State v. Evans, 225 So.2d 548 (Fla. 3d DCA 1969), certiorari denied,

229 So.2d 261 (Fla. 1969), certiorari denied, 397 U.S. 1053 (1970):

> The respondent contends and urges us to hold, that if a motion to mitigate sentence is filed within 60 days of the date a sentence is pronounced by a trial court, that court has the power to hold hearings on the motion and act upon it at any time. Cf. Leyvas v. United States, 371 F.2d 714 (9th Cir. 1967). The plain language of § 921.25 and Rule 1.800(b) prohibits us from announcing such a rule. Respondent's construction of the statute and rule would permit indefinite supervision by a trial court over all legal sentences it imposes. Such supervision does not accord with reason or public policy. Under our tripartite system of government there must come a time when the judiciary's power to reduce a lawful sentence ends and vest in the executive department. Cf. Brown v. State, 152 Fla. 853, 13 So.2d 458, 461-462 (1943); Annot. 168 A.L.R. 706, 711 (1947). We think the statute and rule prescribe that time.

State v. Evans, supra, at 550.

The opinion of the Court of Appeals advanced that rationale as being the most important of three separate, legitimate governmental ends which the rule promotes. As discussed, the rule guarantees that trial courts will not usurp the power of the parole board by making delayed rulings on motions to mitigate based upon prison conduct. See Sotto v. Wainwright, 601 F.2d 184, 192 (5th Cir. 1979).

The other two governmental ends which are achieved are finality of result and the avoidance of repeated filing of new motions. While these two goals might be achieved by a sentence mitigation rule written or interpreted in a different manner, the test of constitutionality is not whether a preferable alternative law exists. See Sotto v. Wainwright,

supra, at 192. In any case, the primary purpose of the rule is to prevent the trial judge from usurping the power of the parole board, and that purpose can only be achieved by requiring the motion to be ruled on within a given period of time.

The federal rule is interpreted differently because the federal courts decided not to give as much weight to the potential dangers of inviting trial courts to procrastinate in deciding motions and to usurp the function of parole boards "by holding the motion in abeyance pending examination of the defendant's conduct in prison," United States v. Mendoza, supra, at 1291 in exchange for assuring the defendant that his motion will be ruled on. The federal interpretation is not grounded on constitutional principles, however, so it is not binding on the states.

CONCLUSION

The petitioner does not have a federal constitutional right to have a motion to mitigate ruled on. The only right the petitioner has relating to a motion to mitigate is that which is conferred upon him by a state rule of procedure. Because that rule of procedure has a rational basis and promotes legitimate governmental policies, the rule does not violate substantive due process and the petitioner was not denied equal protection under the laws. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT IN OPPOSITION was furnished by mail to GEOFFREY C. FLECK, Attorney for Petitioners, 500 Security Trust Building, 700 Brickell Avenue, Miami, Florida, 33131, this _____ day of March, 1980.

STEVEN R. JACOB
Assistant Attorney General